

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

PETER A. SPALLUTO	)	
and ACCESS WITH SUCCESS, INC.	)	
Plaintiffs	)	
	)	CIVIL ACTION NO.:
Vs.	)	05-CV-10385-EFH
	)	
HDP, INC.,	)	
Defendant	)	

**DEFENDANT HDP, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS**  
**MOTION TO DISMISS**  
**FOR PLAINTIFFS' FAILURE TO ATTEND DEPOSITIONS**  
**AS ORDERED BY THE COURT**

**STATEMENT OF FACTS**

On or about February 23, 2005 the plaintiffs commenced this action by filing their complaint in this court. The complaint seeks monetary damages and injunctive relief, *inter alia*, arising under the Americans with Disabilities Act, 42 USC, sec. 12101, *et seq.*, and similar relief arising from pendant claims pursuant to Massachusetts law.

The defendant is a restaurant and bar located at 45 Broad Street, Boston, Massachusetts, known as "Bakey's". The original complaint incorrectly identified the owner of the restaurant as "Bakey's, Inc.". Some time prior to February 1, 2006, plaintiffs filed, by way of assented-to motion, an amended complaint correctly identifying the owner of the restaurant, HDP, Inc.

Plaintiff Spalluto alleges that he suffered discrimination and other damages on or about September 7, 2004 because he is wheelchair bound and attempted to eat at Bakey's, but was unable to do so because architectural barriers prevented him from entering the premises.

Plaintiff Access identifies itself as a charitable corporation whose corporate purposes include advocating for the rights of persons with disabilities to have equal access to facilities such as restaurants and bars. Access alleges that it is an injured person and entitled to bring this action because one of its members, Mr. Spalluto, was denied access to Bakey's.

HDP, Inc. has denied that it caused damages or that it discriminated against either plaintiff. It is of significance that the plaintiffs, to create an actionable complaint, allege that "*[u]pon information and belief, HDP has made renovations since January 26, 1992 [i.e., the effective date of the Americans with Disabilities Act] such that including accessibility features was mandatory.*" [Plaintiffs' complaint, Paragraph 24] In fact, no such renovations have ever been made since the premises opened in the late 1980's.

The defendant began attempting to take the depositions of the plaintiffs after the appearance of undersigned counsel. Efforts to schedule the depositions at a mutually convenient time were unsuccessful. Defendant served notices for the depositions of the plaintiffs for November 6, 2006. On November 3, 2006, plaintiffs' counsel contacted defendant's counsel to inform him that Mr. Spalluto, a Florida resident, would not appear for his deposition. He also explained that Mr. Spalluto was the 30(b) (6) spokesperson for Access, and, as he would not be appearing, neither deposition would go forward.

Subsequent to these events, or, "non-events", defendant moved for an order compelling the plaintiffs to appear for their depositions. A copy of that motion and its attachments is attached hereto as "Exhibit 1".

On January 8, 2007, This Court entered an electronic order on the motion to compel. The order states: "Motion allowed. Failure to appear shall result in dismissal of case." (Emphasis added) [See Docket Report attached hereto as "Exhibit 2".]

After the ruling of the court, the defendant re-noticed the depositions of Mr. Spalluto and of Access, both for January 24, 2007<sup>1</sup>. [Copies of the notices are attached as Exhibits 3 and 4]

Mr. Spalluto did not appear for his deposition. [See Transcript, "Scheduled Deposition of Peter A. Spalluto", attached hereto as Exhibit 5.]

For the 30(b)(6) deposition of Access, plaintiffs' counsel produced a gentleman by the name of Dino N. Theodore, Esq., who affirmed, after being sworn, that he had been designated as the person who was to speak on behalf of Access with Success, Inc. [See "Deposition of Access With Success, Inc., attached hereto as "Exhibit 6, P.6, ll. 9-12.]

Schedule A to the 30(b)(6) deposition notice instructed Access that its spokesperson was to testify about three topics, the matters alleged in the complaint, the identities of persons having knowledge of the matters alleged in the complaint, and the activities of Access with respect to other actions or claims made under the Americans with Disabilities Act.

Attorney Theodore was unfamiliar with both basic information pertaining to Access with Success, Inc., and with the facts and circumstances of the present action. In fact, he testified that his only contact having anything to do with Access with Success

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<sup>1</sup> The notices reflect the date of January 23, 2007 at the offices of defendant's counsel. By agreement of counsel, the depositions were both rescheduled for the following day, January 24, 2007, and the location was changed to the office of plaintiffs' counsel.

insofar as arranging for his testimony as its spokesperson was communications with its counsel, attorney Guerrero. [Exhibit 6, P. 11, L.15 to P. 12, L.2]

Among other salient features of Mr. Theodore's testimony:

- A. He did not know how one becomes a member of Access. [Exhibit 6, P. 9, Ll. 13-17]
- B. He did not know if membership is restricted in any way. [Ex. 6, P. 11, Ll. 7-11]
- C. He did not know who would have that information. [Ex. 6., P. 11, Ll. 12-14]
- D. He is uncertain whether Access has a website. {Ex. 6, P. 17, Ll. 16-19}
- E. He is uncertain of the identity of the President of Access. [Ex. 6, P.19, Ll. 17-22]
- F. Apart from bringing legal actions, he does not know what services Access provides. [Ex. 6, P. 27, L. 9 to P. 28, L. 7.
- G. He does not know who would have that information. [Ex. 6, P. 28, LL. 8-12]

With respect to the matters alleged in the compliant, Mr. Theodore is one of fourteen persons who are identified, in the first numbered paragraph of the complaint, as being members of Access with Success, Inc. Mr. Theodore, the corporation's spokesperson, testified that has never met any of the other thirteen persons identified as being members, although he does recognize some of their names as being parties, along

with Access, in some civil actions that have been brought in federal courts in Massachusetts and in New Hampshire.<sup>2</sup> [Ex. 6, P. 35, L. 3 to P. 43, L. 21]

He has no personal knowledge of the factual assertions contained in the complaint concerning the alleged discrimination against Mr. Spalluto on September 7, 2004. {Ex. 6, P. 51, L1. 11-19]

He has no knowledge concerning the incorrect assertion, referred to at the beginning of this memorandum, that there have been renovations at the defendant's restaurant since the effective date of the act giving rise to this litigation. (Again, there have been no renovations.). He does not know who would have information concerning that assertion. [Ex. 6, P. 51, L.20 to P. 21, L. 14.]

In short, Mr. Theodore, as 30(b)(6) spokesperson for Access with Success, Inc., had no pertinent information concerning the any of the topics identified in Schedule A to deposition notice. To put it succinctly, his deposition was a waste of time and money, and a flagrant disregard for the order of this Court.

## **1. ARGUMENT**

### **A. Peter A. Spalluto**

The plaintiffs' complaint should be dismissed by the Court with prejudice, forthwith. The plaintiffs refused to appear for their depositions when they were originally noticed for November 6, 2006. The defendant was forced by the plaintiffs' actions to seek the assistance of the Court. The Court granted the defendant's motion to

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<sup>2</sup> Mr. Theodore was somewhat imprecise as to the number of civil actions brought by Access. He testified at one point there were four, he mentioned others, and estimated there were seven or eight altogether. [Ex. 6, PP. 12, L. 21 – P. 16, L. 22} In fact, there are 19 cases in this district and 10 cases in the district of New Hampshire in which Access is a plaintiff. Mr. Theodore also appears to be a plaintiff in 4 of them. {See Exhibit 7, attached hereto, which are downloads from PACER for the District of Massachusetts and the District of New Hampshire, showing cases in which Access is a plaintiff}

compel the plaintiffs to appear for their depositions, and explicitly stated the complaint would be dismissed if they failed to so appear.

Mr. Spalluto simply refused to appear, as his deposition transcript indicates. He never sought a protective order from this Court; he simply chose to ignore the Court's order and the deposition notice.

F.R.C.P. 37 (b)(2)(C) allows the Court to dismiss the action if a party fails to obey an order to provide discovery. Mr. Spalluto did precisely that. As Aldous Huxley noted in the foreword to his novel, *Brave New World*, "You pays your money and you takes your choice." Mr. Spalluto has done that, and now should face the consequences that this Court told him he would face, namely dismissal of his complaint.

Trial in this matter is scheduled for April 9, 2007. Mr. Spalluto has made himself unavailable for discovery since at least May 2006. Defendant cannot prepare for trial without the deposition of the plaintiffs, and should not have to do so. The appropriate sanction is dismissal, an action taken by this Court and affirmed by the 1<sup>st</sup> Circuit in the past. See, Young v. Gordon, 330 F3d 76 (1<sup>st</sup> Cir. 2003).

#### **B. Access With success, Inc.**

The conduct of the co-plaintiff in this matter is more egregious than that of Mr. Spalluto, who merely defied this court's order. Access did more: Access with Success ridiculed it.

The spokesperson allegedly selected by the corporation had never been contacted by the corporation, only by its attorney. He is ignorant of the activities of the corporation, ignorant of the facts alleged by it in its complaint, and ignorant of its membership, officers and directors. In short, attorney Theodore was no more than "a

warm body" sitting at a conference room table, with absolutely no information of relevance to the case, the plaintiffs' facts, or either plaintiff. He wasted the defendant's time and effort, and did so in defiance of this Court's order that the corporation appear, through a spokesperson, for its deposition.

That conduct, it is respectfully submitted, was reprehensible. It was certainly not a deposition by any stretch of the meaning of the term. Once again, attorney Theodore's appearance did not come after the corporation sought a protective order to limit in any way the timing, duration or scope of the deposition. His appearance as a spokesperson - was utterly ignorant regarding the topics listed on the deposition notice's schedule - made the exercise a complete waste of time and money.

The Rules regarding discovery do not countenance this conduct. F.R.C.P. 37, as cited above, gives this Court the authority to dismiss the complaint for failure to comply with a discovery order. Access With Success, Inc. did so, and its complaint should be dismissed.

The First Circuit does not countenance such conduct. Young v. Gordon, 330 F3d 76 (1<sup>st</sup> Cir. 2003), *supra*. See also, Damiani v. Rhode Island Hospital, 704 f. 2d 12 (1<sup>st</sup> Cir. 1983); Rivera Diaz v. American Airlines, Inc., 433 F.3d 120 (1<sup>st</sup> Cir. 2005).

In Diaz, *supra*, the First Circuit, citing HMG Prop. Investors, Inc. v. Parque Industrial Rio Canas, Inc., 847 F.2d 908 (1<sup>st</sup> Cir. 1988), points out :

The law is well established in this circuit that where a noncompliant litigant has manifested a disregard for orders of the court and been suitably forewarned of the consequences of continued intransigence, a trial judge need not first exhaust milder sanctions before resorting to dismissal. *Op. Cit.* 847 F.2d, at 918.

Access with Success, Inc. is a plaintiff in at least nineteen separate actions appearing on the docket of the US District Court for the District of Massachusetts. It is a plaintiff in at least 10 other actions appearing on the docket of the New Hampshire District. It is no stranger to litigation; it should be no stranger to the Federal Rules of Civil Procedure and it should be no stranger when it comes to compliance with direct orders of this Court.

Its actions in this case are almost sinister, and warrant the determination that the deposition of attorney Theodore represents an explicit repudiation of this court's order. Dismissal is warranted and just in these premises.

Wherefore Defendant HDP, Inc. moves for the entry of an order dismissing the complaint against it as to both plaintiffs, with prejudice.

Respectfully submitted,  
HDP, INC.  
By its Attorney,

/s/ Brian J. McMenimen

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Brian J. McMenimen  
BBO # 338840  
Adler Pollock & Sheehan P.C.  
175 Federal Street  
Boston, Massachusetts 02110  
(617) 482-0600  
[bmcmenimen@apslaw.com](mailto:bmcmenimen@apslaw.com)  
Dated: March 22, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on March 22, 2007.

/s/ Brian J. McMenimen

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Brian J. McMenimen

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

PETER A. SPALLUTO )  
and ACCESS WITH SUCCESS, INC. )  
Plaintiffs )  
Vs. ) CIVIL ACTION NO.:  
HDP, INC., ) 05-CV-10385-EFH  
Defendant )  
)

**MOTION OF DEFENDANT, HDP, INC., FOR AN ORDER  
COMPELLING THE PLAINTIFFS, PETER A. SPALLUTO  
AND ACCESS WITH SUCCESS, INC., TO APPEAR FOR A DEPOSITION**

The defendant, HDP, Inc., hereby moves that an Order issue from this Court compelling each of the plaintiffs herein, Peter A. Spalluto and Access with Success, Inc., to appear for their depositions at the office of the defendant's counsel, Brian McMenimen, of Adler, Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts. As grounds for its motion, in addition to the accompanying memorandum of law, the defendant states:

1. The defendant previously noticed the plaintiffs' depositions for November 6, 2006 at 10:00 a.m. and 12:00 p.m., respectively, to take place at Adler, Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts. Notices of Deposition were properly served upon the plaintiffs' attorney, Nicholas S. Guerrera, Esq., Shaheen, Guerrera & O'Leary, LLC, Jefferson Office Park, 820A Turnpike Street, North Andover, MA 01845. Copies of the Notices of Deposition are attached hereto as Exhibit A.

2. Plaintiffs' counsel telephoned defendant's counsel's office on Friday, November 3, 2006, to inform him that plaintiffs will not be attending the depositions scheduled for Monday, November 6, 2006. Counsel's explanation was that Mr. Spalluto resided Florida and did not

intend to return to Massachusetts at this time because he is wheelchair bound and prone to health problems in cold weather.

3. Access with Success, Inc. is identified in the plaintiff's complaint as being a Massachusetts corporation.

4. Plaintiff Spalluto has been represented to the Court by his counsel as "a frequent visitor to Boston". [See (1) (a), 2d paragraph, of the Plaintiff's pre-trial memorandum.]

5. The plaintiffs brought their action against the defendant in the District of Massachusetts.

6. Defendant has made efforts to depose the plaintiffs in the past, but those efforts were unsuccessful because Mr. Spalluto was not in Massachusetts at any time when the defendant's undersigned counsel was available to conduct his deposition.

7. The defendant offered to postpone the depositions for one week, until November 13, 2006, in order to permit the plaintiffs to seek protective orders from the court regarding the taking of the depositions; however the plaintiffs have not sought a protective order regarding their depositions.

For all of the above reasons, the defendant moves that this Court issue an Order compelling the plaintiffs to appear for their depositions on February 16, 2007, or at an earlier time mutually agreeable to plaintiffs' counsel and defendant's counsel, at the offices of Adler, Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts.

#### **REQUEST FOR ORAL ARGUMENT**

Defendant HDP, Inc., requests oral argument on this motion, in the event the Court deems it would be helpful to hear from counsel.

Respectfully submitted,  
HDP, INC.  
By its Attorney,

/s/ Brian J. McMenimen

Brian J. McMenimen  
BBO # 338840  
Adler Pollock & Sheehan P.C.  
175 Federal Street  
Boston, Massachusetts 02110  
(617) 482-0600  
[bmcmenimen@apslaw.com](mailto:bmcmenimen@apslaw.com)  
Dated: December 20, 2006

**CERTIFICATE OF COUNSEL**

I, Brian McMenimen, attorney for the defendant, HDP, Inc., certify that counsel for the plaintiffs and counsel for the defendant have conferred and have attempted in good faith to resolve or narrow the scope of the issue presented in this motion.

/s/ Brian J. McMenimen

Brian J. McMenimen

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on December 20, 2006.

/s/ Brian J. McMenimen

Brian J. McMenimen

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

<b>PETER A. SPALLUTO and ACCESS WITH SUCCESS, INC.</b> Plaintiff, v. <b>HDP, INC.,</b> Defendant.	) ) ) ) ) ) ) <b>CIVIL ACTION NO.: 05-cv-10385EFH</b>
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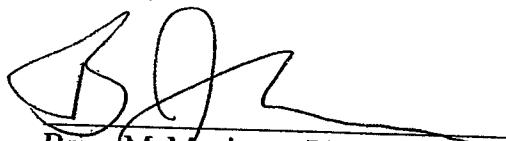
**NOTICE OF TAKING 30(b)(6) DEPOSITION**

To: Nicholas S. Guerrera  
 Shaheen, Guerrera & O'Leary, LLC  
 Jefferson Office Park  
 820A Turnpike Street  
 North Andover, MA 01845

Please take notice that at 10:00 a.m. on Monday, November 6, 2006 at the offices of Adler Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts, the defendant in this action, by its attorney will take the deposition upon oral examination of Access With Success, Inc. pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, before Mahaney Reporting Services, Notary Public in and for the Commonwealth of Massachusetts, or before some other officer authorized by law to administer oaths. The defendants requests that Access With Success, Inc. designate one or more officers, directors, managing agents, or other persons who consent to being designated to testify pursuant to Fed. R. Civ. P. 30(b)(6) on the matters described in Schedule A.

You are invited to attend and cross-examine.

Respectfully submitted,  
 DEFENDANTS  
 HDP, INC.  
 By its attorney,



Brian McMenimen, BBO # 338840  
 ADLER POLLOCK & SHEEHAN, P.C.  
 175 Federal Street  
 Boston, MA 02110  
 (617) 482-0600 Telephone  
 (617) 482-0604 Facsimile

Dated: October 24, 2006

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail on [REDACTED]

Schedule A

1. Every matter and assertion alleged in the plaintiffs' complaint, including the factual basis for the assertion appearing in paragraph 24 that HDP, Inc. has made renovations to the premises since January 26, 1992.
2. The identity of persons who have personal knowledge of the matters alleged in the complaint.
3. the activities of the plaintiff with respect to other claims made or actions commenced by it under the Americans with Disabilities Act.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

PETER A. SPALLUTO and )  
ACCESS WITH SUCCESS, INC. )  
Plaintiff, ) CIVIL ACTION NO.: 05-cv-10385EFH  
)  
v. )  
)  
HDP, INC., )  
Defendant. )

**NOTICE OF TAKING DEPOSITION**

To: Nicholas S. Guerrera  
Shaheen, Guerrera & O'Leary, LLC  
Jefferson Office Park  
820A Turnpike Street  
North Andover, MA 01845

Please take notice that at 12:00 p.m. on Monday, November 6, 2006 at the offices of Adler Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts, the defendant in this action, by its attorney will take the deposition upon oral examination of Peter Spalluto pursuant to the Federal Rules of Civil Procedure, before Mahaney Reporting Services, Notary Public in and for the Commonwealth of Massachusetts, or before some other officer authorized by law to administer oaths.

You are invited to attend and cross-examine.

Respectfully submitted,  
DEFENDANTS  
HDP, INC.  
By its attorney,



Brian McMenimen, BBO # 338840  
ADLER POLLOCK & SHEEHAN, P.C.  
175 Federal Street  
Boston, MA 02110  
(617) 482-0600 Telephone  
(617) 482-0604 Facsimile

Dated: October 24, 2006

397375\_1

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail. Hand on 

**Motions**1:05-cv-10385-EFH Spalluto et al v. HDP, Inc.**United States District Court****District of Massachusetts****Notice of Electronic Filing**

The following transaction was received from McMenimen, Brian J. entered on 12/20/2006 at 2:19 PM EST and filed on 12/20/2006

**Case Name:** Spalluto et al v. HDP, Inc.

**Case Number:** 1:05-cv-10385

**Filer:** HDP, Inc.

**Document Number:** 14

**Docket Text:**

MOTION to Compel by HDP, Inc.. (Attachments: # (1) Exhibit Copies of deposition notices)(McMenimen, Brian)

The following document(s) are associated with this transaction:

**Document description:** Main Document

**Original filename:** yes

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1029851931 [Date=12/20/2006] [FileNumber=1697319-0] [3f144df1d2ca9435a661731a4f77d4ae3e1d6d4c4c13e9e129768b598b4d2fb14769c27701378830f90ed484a9b34a2d22f52a5af83d4ff4e03f4fdac2b4299c]]

**Document description:** Exhibit Copies of deposition notices

**Original filename:** yes

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1029851931 [Date=12/20/2006] [FileNumber=1697319-1] [8cb7b4095f5e6d6d1629603f09d7aa7b637485769eddc07753a53be832c03f7cb72d34ef2a13d8c1e17112d617f93be29a5f6545b7b5449c9a8cddf3b5f3b69b]]

**1:05-cv-10385 Notice will be electronically mailed to:**

Nicholas S. Guerrera nnguerrera@sgolawoffice.com

Brian J. McMenimen bmcmenimen@apslaw.com

**1:05-cv-10385 Notice will not be electronically mailed to:**

**United States District Court  
District of Massachusetts (Boston)  
CIVIL DOCKET FOR CASE #: 1:05-cv-10385-EFH**

Spalluto et al v. HDP, Inc.

Assigned to: Senior Judge Edward F. Harrington

Cause: 28:1983 Civil Rights

Date Filed: 02/28/2005

Jury Demand: Both

Nature of Suit: 440 Civil Rights: Other

Jurisdiction: Federal Question

**Plaintiff**

**Peter A. Spalluto**

represented by **Nicholas S. Guerrera**  
Shaheen Guerrera & O'Leary, LLC  
Jefferson Office Park  
820A Turnpike Street  
North Andover, MA 01845  
978-689-0800  
Fax: 978-794-0890  
Email: [nguerrera@sgolawoffice.com](mailto:nguerrera@sgolawoffice.com)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Access With Success, Inc.**

represented by **Nicholas S. Guerrera**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**Bakey's Incorporated**

TERMINATED: 01/31/2006

**Defendant**

**HDP, Inc.**

represented by **Brian J. McMenimen**  
Adler, Pollock & Sheehan  
175 Federal Street  
Boston, MA 02110  
617-482-0600  
Fax: 617-482-0604  
Email: [bmcmenimen@apslaw.com](mailto:bmcmenimen@apslaw.com)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
02/28/2005	1	COMPLAINT against Bakey's Incorporated Filing fee: \$ 250, receipt number 62378, filed by Peter A. Spalluto, Access With Success, Inc.. (Attachments: # 1 Civil Cover Sheet# 2 Catagory Sheet)(Holahan, Sandra) (Entered: 03/01/2005)

02/28/2005		If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge SOROKIN. (Holahan, Sandra) (Entered: 03/01/2005)
02/28/2005		Summons Issued as to Bakey's Incorporated. (Holahan, Sandra) (Entered: 03/01/2005)
02/28/2005	<u>2</u>	CORPORATE DISCLOSURE STATEMENT by Access With Success, Inc.. (Holahan, Sandra) (Entered: 03/01/2005)
03/17/2005	<u>3</u>	SUMMONS Returned Executed Bakey's Incorporated served on 3/9/2005, answer due 3/29/2005. (Holahan, Sandra) (Entered: 03/22/2005)
12/13/2005		NOTICE of Hearing: Status Conference set for 1/31/2006 11:00 AM in Courtroom 13 before Senior Judge Edward F. Harrington. (Holahan, Sandra) (Entered: 12/13/2005)
01/25/2006	<u>4</u>	Assented to MOTION for Leave to File <i>Amended Complaint</i> by Access With Success, Inc.. (Attachments: # <u>1</u> )(Guerrera, Nicholas) (Entered: 01/25/2006)
01/31/2006	<u>5</u>	NOTICE of Appearance by Brian J. McMenimen on behalf of Bakey's Incorporated (McMenimen, Brian) (Entered: 01/31/2006)
01/31/2006		Judge Edward F. Harrington : Electronic ORDER entered granting <u>4</u> Motion for Leave to File. MOTION ALLOWED. cc/cl *** Counsel using the Electronic Case Files system should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. (Holahan, Sandra) (Entered: 01/31/2006)
01/31/2006		Electronic Clerk's Notes for proceedings held before Judge Edward F. Harrington : Status Conference held on 1/31/2006. Counsel for parties appear; Court allows plaintiff's motion to amend complaint; Parties to stipulate to discovery dates; Order to issue scheduling final pretrial conference; (Court Reporter none.) (Holahan, Sandra) (Entered: 02/01/2006)
01/31/2006	<u>7</u>	Judge Edward F. Harrington : ORDER entered. PROCEDURAL ORDER re pretrial: Final Pretrial Conference set for 9/13/2006 11:00 AM in Courtroom 13 before Senior Judge Edward F. Harrington. SO ORDERED. cc/cl(Holahan, Sandra) (Entered: 02/01/2006)
02/01/2006	<u>6</u>	AMENDED COMPLAINT against HDP, Inc., filed by Access With Success, Inc.. (Guerrera, Nicholas) (Entered: 02/01/2006)
04/04/2006	<u>8</u>	Assented to MOTION for Leave to File <i>Answer Late</i> by HDP, Inc.. (Attachments: # <u>1</u> Exhibit A to Motion for Leave to File Answer Late)(McMenimen, Brian) (Entered: 04/04/2006)
04/05/2006		Judge Edward F. Harrington : Electronic ORDER entered granting <u>8</u> Motion for Leave to File. MOTION ALLOWED. cc/cl (Holahan, Sandra) (Entered: 04/06/2006)
04/07/2006	<u>9</u>	ANSWER to Complaint with Jury Demand by HDP, Inc..(McMenimen, Brian) (Entered: 04/07/2006)
04/14/2006	<u>10</u>	CERTIFICATE OF CONSULTATION Pursuant to Local Rule 16.1(D)(3) by Nicholas S. Guerrera on behalf of all plaintiffs. (Guerrera, Nicholas) (Entered: 04/14/2006)
08/30/2006	<u>11</u>	Judge Edward F. Harrington : AMENDED FINAL PRETRIAL CONFERENCE ORDER entered. Final Pretrial to be held on Tuesday, October 24, 2006 at 11:00 a.m. (Folan, Karen) (Entered: 08/30/2006)

10/24/2006		ElectronicClerk's Notes for proceedings held before Judge Edward F. Harrington : Final Pretrial Conference held on 10/24/2006. Colloquy re: status of case. Bench Trial estimated to last 2-3 days. Discussions regarding settlement. EFH will give a trial date in March. Parties to sit down and try to compromise on some issues. (Court Reporter Patrisso.) (Folan, Karen) (Entered: 10/24/2006)
10/24/2006	<u>12</u>	PRETRIAL MEMORANDUM by Access With Success, Inc.. (Guerrera, Nicholas) (Entered: 10/24/2006)
10/24/2006	<u>13</u>	Judge Edward F. Harrington : ORDER entered. Bench trial set for 4/9/07 at 9:00 a.m. (Folan, Karen) (Entered: 10/24/2006)
12/20/2006	<u>14</u>	MOTION to Compel by HDP, Inc.. (Attachments: # 1 Exhibit Copies of deposition notices)(McMenimen, Brian) (Entered: 12/20/2006)
12/20/2006	<u>15</u>	MEMORANDUM in Support re <u>14</u> MOTION to Compel filed by HDP, Inc.. (McMenimen, Brian) (Entered: 12/20/2006)
01/08/2007		Judge Edward F. Harrington : Electronic ORDER entered granting <u>14</u> Motion to Compel. "Motion allowed. Failure to appear shall result in dismissal of case. So ordered." (Folan, Karen) (Entered: 01/08/2007)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
03/16/2007 12:42:46			
PACER Login:	bm0714	Client Code:	400806-002
Description:	Docket Report	Search Criteria:	1:05-cv-10385-EFH
Billable Pages:	2	Cost:	0.16

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

PETER A. SPALLUTO and )  
ACCESS WITH SUCCESS, INC. )  
Plaintiff, )  
v. )  
HDP, INC., )  
Defendant. )

CIVIL ACTION NO.: 05-cv-10385EFH

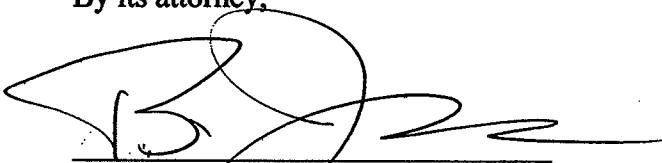
**RE-NOTICE OF TAKING DEPOSITION**

To: Nicholas S. Guerrera  
Shaheen, Guerrera & O'Leary, LLC  
Jefferson Office Park  
820A Turnpike Street  
North Andover, MA 01845

Please take notice that at 12:00 p.m. on Tuesday, January 23, 2007 at the offices of Adler Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts, the defendant in this action, by its attorney will take the deposition upon oral examination of Peter Spalluto pursuant to the Federal Rules of Civil Procedure, before Mahaney Reporting Services, Notary Public in and for the Commonwealth of Massachusetts, or before some other officer authorized by law to administer oaths.

You are invited to attend and cross-examine.

Respectfully submitted,  
DEFENDANT, HDP, INC.  
By its attorney,



Brian McMenimen, BBO # 338840  
ADLER POLLOCK & SHEEHAN, P.C.  
175 Federal Street  
Boston, MA 02110  
(617) 482-0600 Telephone  
(617) 482-0604 Facsimile

Dated: January 9, 2007

PETER A. SPALLUTO and )  
ACCESS WITH SUCCESS, INC. )  
Plaintiff, ) CIVIL ACTION NO.: 05-cv-10385EFH  
)  
v. )  
)  
HDP, INC., )  
Defendant. )

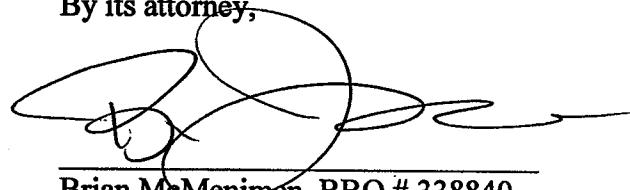
**RE-NOTICE OF TAKING 30(b)(6) DEPOSITION**

To: Nicholas S. Guerrera  
Shaheen, Guerrera & O'Leary, LLC  
Jefferson Office Park  
820A Turnpike Street  
North Andover, MA 01845

Please take notice that at 10:00 a.m. on Tuesday, January 23, 2007 at the offices of Adler Pollock & Sheehan, P.C., 175 Federal Street, Boston, Massachusetts, the defendant in this action, by its attorney will take the deposition upon oral examination of Access With Success, Inc. pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, before Mahaney Reporting Services, Notary Public in and for the Commonwealth of Massachusetts, or before some other officer authorized by law to administer oaths. The defendants requests that Access With Success, Inc. designate one or more officers, directors, managing agents, or other persons who consent to being designated to testify pursuant to Fed. R. Civ. P. 30(b)(6) on the matters described in Schedule A.

You are invited to attend and cross-examine.

Respectfully submitted,  
DEFENDANT, HDP, INC.  
By its attorney,



Brian McMenimen, BBO # 338840  
ADLER POLLOCK & SHEEHAN, P.C.  
175 Federal Street  
Boston, MA 02110  
(617) 482-0600 Telephone  
(617) 482-0604 Facsimile

Dated: January 9, 2007

**Schedule A**

1. Every matter and assertion alleged in the plaintiffs' complaint, including the factual basis for the assertion appearing in paragraph 24 that HDP, Inc. has made renovations to the premises since January 26, 1992.
2. The identity of persons who have personal knowledge of the matters alleged in the complaint.
3. the activities of the plaintiff with respect to other claims made or actions commenced by it under the Americans with Disabilities Act.

1 VOL. I  
2 PAGES 1-5  
3 EXHIBITS 1-2

4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF MASSACHUSETTS

6  
7 PETER A. SPALLUTO and )  
8 ACCESS WITH SUCCESS, INC., )  
9 Plaintiffs, )  
10 vs ) CIVIL ACTION NO.  
11 HDP, INC., ) 05-cv-10385EFH  
12 Defendant. )  
13  
14  
15  
16 SCHEDULED DEPOSITION OF PETER A.

17 SPALLUTO, taken on behalf of the defendant, pursuant to  
18 the applicable provisions of the Federal Rules of Civil  
19 Procedure, before Kimberly A. McGonagle, Registered  
20 Professional Reporter, CSR No. 110393, Notary Public in  
21 and for the Commonwealth of Massachusetts, at the offices  
22 of Shaheen, Guerrera & O'Leary, LLC, 820A Turnpike  
23 Street, North Andover, Massachusetts, on Wednesday,  
24 January 24, 2007, commencing at 11:39 a.m.

## 1 | APPEARANCES:

SHAHEEN, GUERRERA & O'LEARY, LLC  
(by Nicholas S. Guerrera, Esq.)  
Jefferson Office Park  
820A Turnpike Street  
North Andover, Massachusetts 01845  
for the plaintiffs.

ADLER POLLOCK & SHEEHAN, P.C.  
(by Brian J. McMenimen, Esq.)  
175 Federal Street  
Boston, Massachusetts 02110-2210  
for the defendant.

ALSO PRESENT: Dino N. Theodore

## I N D E X

15	<u>Scheduled Deposition of:</u>	<u>Page</u>
16	PETER A. SPALLUTO	3
17		
18		
19		
20	<u>Exhibits</u>	<u>Page</u>
21	No. 1 Re-Notice of Taking Deposition	3
22	No. 2 Letter dated 1/18/2007	3

1 MR. McMENIMEN: I'm ready to go  
2 forward with calling the second deposition that's been  
3 noticed for today and that would be the notice of the  
4 deposition of Peter Spalluto. And for that deposition I  
5 would mark the notice of -- the deposition notice.  
6 You've got a copy of it.

7 MR. GUERRERA: Yes.

9 (Exhibit No. 1 Re-Notice of Taking Deposition marked)

10  
11 (Exhibit No. 2 Letter dated 1/18/2007 marked)

13 (Discussion off the record)

14 MR. McMENIMEN: The second  
15 document that I would request be marked is another copy  
16 of my letter of January 18 referencing that the  
17 deposition, which is noticed for the 23rd, was moved by  
18 agreement to the 24th. And the place of the deposition  
19 was changed from my office in Boston to plaintiff's  
20 counsel's office in North Andover.

21 It's also my understanding from  
22 communications that I've had with counsel that Mr.  
23 Spalluto will not be present to attend the deposition  
24 that's been called.

1 MR. GUERRERA: Mr. Spalluto lives  
2 in Florida. He's quadriplegic. He's been quadriplegic  
3 since 1966. He is at risk of bronchial infections in  
4 cold climates and he can't come to Massachusetts in the  
5 wintertime.

6 I've offered to go to Florida to  
7 take his deposition, at each party's expense. I've  
8 offered to make arrangements to do the deposition via  
9 video teleconference or by telephone and then also to  
10 wait until the springtime when the weather is warmer and  
11 Mr. Spalluto can come to Massachusetts. Any of those  
12 would be alternatives, but a deposition in Massachusetts  
13 in late January is not because of health reasons. That's  
14 all I have.

15 MR. McMENIMEN: Thank you.

16 (Whereupon, the scheduled  
17 deposition was adjourned at  
18 11:42 a.m.)

19

### CERTIFICATE

Commonwealth of Massachusetts  
Middlesex, ss.

6 I, Kimberly A. McGonagle, a Notary  
7 Public and Registered Professional Reporter, do hereby  
8 certify that the foregoing record, pages 1 through 5  
9 inclusive, is a complete, accurate, and true  
10 transcription of my stenographic notes taken in the  
11 aforementioned matter to the best of my skills and  
12 ability.

Kimberly A. McGonagle  
RPR, Notary Public  
CSR No. 110393

Kimberly A. McGonagle  
RPR, Notary Public  
CSR No. 110393

My commission expires  
on May 3, 2013



1 question until I've completed it, and in return I promise  
2 to do my level best not to interrupt you at any time when  
3 you are speaking, how's that?

4 A. Sounds good to me.

5 Q. Okay. Secondly, as I'm sure you know, our  
6 stenographer can only record what is said, she cannot  
7 interpret gestures. So if an answer can be -- If an  
8 answer calls for a yes or a no, you have to indicate with  
9 a yes or a no or some such verbal response rather than a  
10 shake of the head because, as I said, she can't -- she's  
11 not allowed to interpret gestures.

12 A. Okay.

13 Q. Knowing myself as I do, I'm sure that I will ask  
14 questions poorly from time to time, hopefully not all of  
15 the time. But if I ask a question poorly and as a  
16 consequence you don't understand it, just tell me and I  
17 will rephrase it if you don't understand the question,  
18 okay?

19 A. Yes.

20 Q. With that, if there are more rules we'll make  
21 them up as we go along. Let me commence.

22 For the record, would you state  
23 your name and your address.

24 A. My name is Dino Nicholas Theodore. And my

1 Q. All right. And, for the record, I would also  
2 offer a letter that accompanied that document when it was  
3 forwarded to Mr. Guerrera only because the deposition  
4 notice states it's for the 23rd of January and here we  
5 are the 24th. And it also says the deposition is to take  
6 place at my office in Boston when, in fact, we are doing  
7 it at plaintiff's counsel's office in North Andover and  
8 the letter kind of explains that. So I would offer that  
9 for the record and you're welcome to look at it if you  
10 want to, but I'm not going to ask you any questions about  
11 it.

12 Have you had an opportunity to  
13 either in the form in which it appears in Exhibit 1 or in  
14 maybe standing by itself, have you had an opportunity to  
15 look at the three enumerated items in Schedule A to the  
16 deposition notice?

17 A. Yes.

18 Q. Okay. I'm going to ask you a series of  
19 questions about them, but first just a little bit -- if I  
20 could just find out a little bit about who is the  
21 spokesperson for Access with Success. Are you employed,  
22 Mr. Theodore?

23 A. Yes, I am.

24 Q. And what is your occupation?

6

8

1 address is 1305 Methuen Street, Dracut, Massachusetts,  
2 zip 01826.

3 Q. Mr. Theodore, this is the deposition of a  
4 plaintiff in this action, the plaintiff being a  
5 corporation called Access with Success, Incorporated.  
6 Are you familiar with the corporation Access with  
7 Success, Incorporated?

8 A. Yes.

9 Q. And have you been designated, for the record, as  
10 the person who is to speak on behalf of Access with  
11 Success, Incorporated, at this deposition?

12 A. Yes.

13 Q. I'm going to show you what I have already had  
14 marked as Exhibit 1, which is a re-notice of the taking  
15 of the 30(b)(6) deposition.

16 MR. McMENIMEN: Off the record.

17 (Discussion off the record)

18 Q. Have you had a chance to look at that document  
19 now marked Exhibit 1?

20 A. Yes.

21 Q. And have you seen it before, Mr. Theodore, if  
22 you recall?

23 A. I don't recall seeing it, but I may have seen  
24 something similar.

1 A. I'm an attorney.

2 Q. And where do you practice?

3 A. I practice in Massachusetts.

4 Q. Okay. How long have you been a member of the  
5 bar?

6 A. I've been a member of the bar since 1994.

7 Q. Okay. On the record; pardon my ignorance for  
8 giving you instructions on how to conduct a deposition.  
9 I didn't know that you were an attorney so --

10 A. That's quite all right.

11 Q. -- I apologize if I was pedantic.

12 A. No, there's always room to learn more.

13 Q. Boy, do I know that.

14 Tell me, for the record, what your  
15 understanding is of the nature of the business of Access  
16 with Success, Incorporated.

17 A. They're a nonprofit corporation and their  
18 business consists of giving people with -- that are  
19 members of this protected class under the ADA of disabled  
20 individuals an opportunity to have access to places that  
21 they normally wouldn't as a result of their disability.  
22 And it also is helpful in allowing families and friends  
23 of those individuals and quite possibly society as a  
24 whole to benefit from the accessibility of certain places

1 which they may not normally be able to access.  
 2 Q. Are you yourself a member of Access with  
 3 Success, Incorporated, in any way? That is -- let me try  
 4 to refine that a little bit. Are you an officer of the  
 5 corporation?

6 A. No, I'm not an officer.

7 Q. Were you involved in the creation of Access with  
 8 Success, Incorporated?

9 A. No, I was not.

10 Q. All right. Does the corporation have members --  
 11 a membership?

12 A. Yes, they do.

13 Q. How does one become a member of Access with  
 14 Success, if you know?

15 A. I don't know how, but I know it's not a very  
 16 difficult thing to do and I know that one does not have  
 17 to be disabled to be a member.

18 Q. Do you know who the officers -- at present who  
 19 the officers of the corporation are or trustees? I'm not  
 20 sure which.

21 A. I do know who some of the officers are. I don't  
 22 know who all of the officers are.

23 Q. Would you tell me who the persons are that you  
 24 do know?

1 A. I know Scott Frotton is an officer of the  
 2 corporation, as well as Tammy Frotton. And that's about  
 3 as far as I could go with certainty, specific certainty.

4 Q. Do you know what offices they hold in the -- in  
 5 Access with Success?

6 A. I don't know exactly, but I'm under information  
 7 and belief I do believe that Scott Frotton is the  
 8 president.

9 Q. Do you know when Access with Success,  
 10 Incorporated, was first formed as a Massachusetts  
 11 corporation?

12 A. No, I do not know the exact date.

13 Q. Do you know approximately when? What year, for  
 14 example?

15 A. I don't know the exact year either, no. I know  
 16 it is more than seven years, I can tell you that.

17 Q. Okay. How long have you been a member of Access  
 18 with Success?

19 A. I've been a member since 2004.

20 Q. Okay. I don't mean to repeat myself but is  
 21 there -- do you know if there is any kind of a membership  
 22 fee or annual assessment that is solicited or required by  
 23 Access with Success?

24 A. There is no fee that I'm aware of.

1 Q. Do you know if there are any particular  
 2 necessary qualifications that an individual would have to  
 3 have in order to become a member of Access with Success?

4 Now, I understand from an earlier  
 5 answer you don't need to be suffering from a disability.

6 A. That's correct.

7 Q. But are there any limitations on the membership  
 8 of Access with Success?

9 A. I don't believe there are --

10 Q. Okay.

11 A. -- but I may be wrong.

12 Q. Would you know who would know the answer to that  
 13 question?

14 A. I would not know who would know.

15 Q. Okay. It prompts me to ask the question of --  
 16 and to the extent it involves a communication between you  
 17 and Mr. Guerrera or an attorney in his office, obviously  
 18 I don't want to know, but can you tell me the means by  
 19 which you were designated to be the spokesperson for  
 20 Access with Success, Incorporated?

21 A. That involved a communication I had with  
 22 counsel.

23 Q. Okay. Did you have a communication with anybody  
 24 other than counsel to Access with Success, Incorporated,

1 regarding your being the spokesperson?

2 A. No, I did not.

3 Q. Okay. Have you performed any services for  
 4 Access with Success, Incorporated, as an attorney? And  
 5 if you have I don't want to get into attorney --  
 6 privileged materials, just the answer would suffice. I'm  
 7 not going to get into details with you.

8 A. Well, when you say as an attorney, could you be  
 9 more specific as far as representation do you mean or --

10 Q. Have you rendered legal advice or have you  
 11 rendered legal services to Access with Success,  
 12 Incorporated?

13 A. I've had discussions with counsel and I think  
 14 those discussions would probably fall into that category.

15 Q. Let's leave it at that.

16 A. Yes.

17 Q. Are you aware of whether or not Access with  
 18 Success is a party to any other litigation besides the  
 19 litigation that brings us together?

20 A. Yes, I am.

21 Q. Tell me about that. What other litigation is  
 22 Access with Success a party to?

23 A. I know of at least four other cases in which  
 24 Access With Success is a party.

1 Q. Are they pending cases at present, if you know?

2 A. Yes, they are.

3 Q. Okay. Could you tell me where the cases are  
4 pending?

5 A. They are pending in federal court.

6 Q. Do you know what federal court they're pending  
7 in?

8 A. Some are pending in the Massachusetts district  
9 and others are pending in the New Hampshire district.

10 Q. Okay. Do you know the names of the defendants  
11 in the four cases that you're aware of?

12 A. I may know the names of at least a couple.

13 Q. Would you let me know -- I mean would you tell  
14 me what they are?

15 A. Sure. One of the defendants is Club Casino,  
16 another defendant is Hooters. A third defendant is -- I  
17 don't recall the other two, but I know there are two  
18 others.

19 Q. Do you have any function as an attorney -- let  
20 me strike the question and ask it a simple way. Do you  
21 represent Access with Success in any of those pending  
22 actions?

23 A. No, I don't.

24 Q. In addition to the four pending cases or five

1 We had talked a few moments ago  
2 about pending cases in which Access with Success is a  
3 party. And you mentioned you could think of four and  
4 named the defendants in two. Then I asked you, if I  
5 recall correctly, about other cases that are now disposed  
6 of where Access with Success was a party. And I think  
7 you said that you can recall two --

8 A. Uhm-hm.

9 Q. -- that you thought they were both brought in  
10 the federal court in Boston and that you thought one of  
11 them was disposed of and perhaps you're not too sure on  
12 the other one.

13 A. That's correct.

14 Q. Does that comport with your recollection of what  
15 we've just talked about?

16 A. Yes, thank you.

17 Q. Can you identify those two cases for me?

18 A. That were disposed of?

19 Q. Yes.

20 A. One of the cases that was disposed of involved  
21 Market Basket, a supermarket chain. The other one that  
22 was disposed of I do not know -- I think it may have been  
23 disposed of due to bankruptcy proceedings and I think  
24 that was a Hooters case. And I'm not sure if it's been

14

16

1 with this one, that is Spalluto and Access with Success  
2 versus HDP, Inc., do you know whether Access with Success  
3 has brought other lawsuits in the past?

4 A. Yes, I know they have.

5 Q. And about how many are you aware of that they  
6 have brought in the past?

7 A. I'm only aware of one or two.

8 Q. Do you know where those cases were brought, the  
9 venue of those cases?

10 A. I believe they were brought in the Massachusetts  
11 federal district as well, federal court.

12 Q. Okay. And those cases, as far as you know the  
13 ones that you recall, are disposed of now?

14 A. I believe -- I believe one may be. I'm not  
15 quite sure of the, you know, the position of those cases.

16 Q. Okay. But so we're -- you can think of two  
17 cases, two prior cases that your memory is -- your best  
18 memory is they are disposed of at the present time?

19 A. No. There are cases -- could you ask the  
20 question again.

21 Q. I took us down that --

22 A. Kind of --

23 Q. I was focusing on -- let me back up so that I  
24 can put my question in a clearer context.

1 disposed of or it's still pending.

2 Q. Have there been more than one Hooters case?

3 A. Yes, there have been.

4 Q. Okay. So the Hooters case that you said was  
5 pending now is different from the one that you were just  
6 telling me that might have been disposed of through  
7 bankruptcy?

8 A. There were actually two Hooters cases and to the  
9 best of my knowledge I believe they both have been in  
10 some way, shape, or form disposed of due to bankruptcy.

11 Q. Okay. Including this case, that is with the  
12 defendant HDP, Incorporated, we've talked about perhaps  
13 seven cases in which Access with Success, Incorporated,  
14 was a party. Four in addition to HDP that may be pending  
15 now and two others you can recall that may be disposed  
16 of.

17 To the best of your recollection,  
18 are those all of the cases in which Access with Success,  
19 Incorporated, has appeared as a party?

20 A. I don't believe they are.

21 Q. You think there are others?

22 A. Yes.

23 Q. Okay. With regard to Access with Success,  
24 Incorporated, can you tell me if there are other



1 regarding, if I can put it under a broad umbrella,  
2 disabilities and accessibility -- you've done it both  
3 individually and on occasion as a spokesperson for Access  
4 with Success, Inc., did I boil your answer down  
5 accurately there?

6 A. I don't think we had boiled it down as a  
7 spokesperson. I think it was more in a capacity  
8 associated in some way with Access. It was not as a  
9 spokesperson, but it was in a forum that was related to  
10 something that concerned Access with Success.

11 Q. Could you tell me what forum you're referring to  
12 or what that particular incident that you're describing?

13 A. It actually involved another piece of litigation  
14 that was filed.

15 Q. And what piece of litigation was that?

16 A. There was an investigation that was conducted at  
17 a site where allegations of discrimination and a  
18 complaint was filed, and there were discussions with  
19 hotel management personnel. It happened to be a hotel.  
20 And it was a case in which Access was involved.

21 Q. Did litigation ensue? When you say a complaint  
22 was filed, it could be a complaint before a body  
23 different from a court. And I haven't asked you about  
24 that yet, but was a complaint filed in a court arising

1 A. Yes, I am.  
2 Q. Okay. Tell me what cases you are a party in.  
3 A. Myself or in conjunction with Access with  
4 Success? I'm not really sure how you --  
5 Q. Well, let's do both. Let's start with you  
6 individually and then you in addition -- in conjunction  
7 with Access with Success.

8 A. Now, when you say a party individually, do you  
9 mean a plaintiff, defendant, or could you narrow it down  
10 a little bit more for me? Because I'm an attorney and I  
11 have cases that I'm involved in. When you say party --

12 Q. Yes. I'm not asking you to identify clients of  
13 yours as an attorney. I'm asking you about cases in  
14 which you are a named party in an action pending in a  
15 court somewhere.

16 A. Okay. And the question is how many cases?

17 Q. Yes.

18 A. I'm going to guess and say five.

19 Q. And are you a plaintiff in each of those  
20 actions?

21 A. Yes.

22 Q. Are they against places of public accommodation?

23 A. Yes, they are.

24 Q. And where are those cases pending?

1 out of that incident that you've just described?

2 A. Not arising out of it. There had already been a  
3 complaint filed.

4 Q. Well, what was the case?

5 A. It was a case against a hotel for issues of  
6 discrimination.

7 Q. What's the name of the hotel?

8 A. The hotel was the Double Tree -- Double Tree  
9 Hotel.

10 Q. And do you know the names of the parties to that  
11 and what court it was --

12 A. Access with Success was a party, as well as  
13 myself, and the defendant was Double Tree Hotels.

14 Q. And where was that case filed?

15 A. In the federal district court in Massachusetts.

16 Q. Is that pending?

17 A. Yes, it is.

18 Q. Okay. So that's one of the other cases that is  
19 pending in federal court in addition to Hooters and  
20 Colony --

21 A. Casino. That actually is a third, you're  
22 correct. You've refreshed my recollection, Counsel.

23 Q. Okay. Are you a party in any other litigation  
24 besides that case that you've just described?

1 A. There are some pending in the Massachusetts  
2 District Federal Court and there is one pending in New  
3 Hampshire Federal District Court, and there is one  
4 pending at the Mass. Commission Against Discrimination.

5 Q. And that was pending at the MCAD, if you will,  
6 has not yet resulted in the filing of formal litigation  
7 in court?

8 A. Well, it depends on how you define a court. The  
9 MCAD is an administrative body which is akin to a court  
10 judicial system so I would have to say yes, it's a court.

11 Q. All right. And as to those five cases that you  
12 think that you are a party -- a plaintiff in, how many of  
13 them are Access with Success also plaintiffs in?

14 A. All but one.

15 Q. Okay. And which is the one that Access with  
16 Success is not a plaintiff in?

17 A. The MCAD case.

18 Q. Okay. So as to the -- there are four cases that  
19 you can recall, one in New Hampshire and three in Mass.,  
20 where the plaintiffs are Dino Theodore and Access with  
21 Success, Inc.; am I right?

22 A. Yes.

23 Q. And are those different from the four cases that  
24 we talked about at the beginning of this deposition that

25

1 are pending in addition to the present case?  
 2 A. Are they different?  
 3 Q. Are they different cases.  
 4 A. They are the same cases that we had spoken about  
 5 that I had recollection of.  
 6 Q. Okay. So the pending Hooters case, for  
 7 example --  
 8 A. Uhm-uhm.  
 9 Q. -- it's Dino Theodore and Access with Success  
 10 versus Hooters, Incorporated, is that --  
 11 A. One of them. There was two -- actually two  
 12 Hooters cases.  
 13 Q. Were you a party to both of those cases?  
 14 A. No, I was not.  
 15 Q. Access with Success was a party to both of those  
 16 cases, I take it?  
 17 A. I'm really not sure.  
 18 Q. Okay. With respect to the Casino -- I can't  
 19 think of the full title that you --  
 20 MR. GUERRERA: Hampton Beach  
 21 Casino.  
 22 Q. It's the Hampton Beach Casino, that is Dino  
 23 Theodore and Access with Success versus the Hampton Beach  
 24 Casino or whatever its corporate name is?

26

1 A. Correct.  
 2 Q. Is that pending in New Hampshire Federal Court?  
 3 A. Yes.  
 4 Q. There is the -- well, in addition to cases in  
 5 which you are an individual defendant and Access with  
 6 Success is a corporate defendant, are you aware of any  
 7 other cases in which Access with Success is a plaintiff,  
 8 that is with other individuals?  
 9 A. I think the terminology you used was defendant.  
 10 Q. I meant plaintiff, excuse me.  
 11 A. I'm sorry, could you give me the second part of  
 12 the question again now?  
 13 Q. Are you aware of any other cases pending  
 14 anywhere, MCAD or court, where Access with Success is a  
 15 party independent of you?  
 16 A. Other than this case?  
 17 Q. Other than this case.  
 18 A. No.  
 19 Q. Okay.  
 20 A. I'm not aware of any.  
 21 Q. Okay. Access with Success, I take it one of its  
 22 functions is to bring actions, legal actions, either  
 23 before the Mass. Commission Against Discrimination or  
 24 pending in court on behalf of persons with disabilities;

27

1 is that an accurate statement?  
 2 A. I don't know if it's one of their functions.  
 3 Q. Well, they've done it some seven or eight times  
 4 that you're aware of, right?  
 5 A. Yes.  
 6 Q. And they may have done it other times that  
 7 you're not aware of?  
 8 A. Right.  
 9 Q. Is it a purpose of Access with Success,  
 10 Incorporated, to bring actions on behalf of persons with  
 11 disabilities or maybe a better way to put it is to bring  
 12 actions involving accessibility barriers in places of  
 13 public accommodation?  
 14 A. I don't know that's its purpose, but it  
 15 certainly is an avenue for getting something done with  
 16 respect to accessibility issues.  
 17 Q. Okay.  
 18 A. But as far as it being a purpose, I can't answer  
 19 yes with respect to that question.  
 20 Q. Okay. In addition to being a party in the  
 21 actions that you've described and perhaps other actions  
 22 that you're not aware of, can you tell me what else  
 23 Access with Success, Incorporated, does?  
 24 A. Well, it's an organization that is nonprofit

1 that -- of people with a wide range of disabilities and  
 2 it gives these people an opportunity to voice themselves  
 3 with respect to problems they may be having in society.  
 4 So that would be a purpose other than litigation.  
 5 Q. Does it offer any services other than providing  
 6 a forum to discuss disability issues?  
 7 A. I don't know.  
 8 Q. And who would know? Again, would that be Mr.  
 9 Frotton, as far as you know?  
 10 A. I suppose Mr. Frotton might know, but as far as  
 11 services it's -- you know, I don't know who would know  
 12 what other, you know, things that may have.  
 13 Q. Well, you'll agree with me someone must know  
 14 because it's an entity, it's a corporate person. It's  
 15 safe to say -- I think what you're saying, so tell me if  
 16 I'm correct, is that you yourself don't know, but there's  
 17 probably somebody else out there that would know; is that  
 18 a fair statement?  
 19 A. I don't know what there are for services that  
 20 someone would know about. You know, the term services --  
 21 you know, it's a group of individuals and I don't know  
 22 that there are certain services that one person provides  
 23 to another.  
 24 I think it's more of just a

1 collaboration. It's a group of different individuals  
2 with different problems and, you know, the service  
3 that -- I don't think there's any one person in that  
4 group that provides any more of a service to another.

5 Q. Other than communicating -- communication with  
6 one another?

7 A. Discussions, you know, and there may be certain  
8 lawsuits that we've discussed, that may be a topic for  
9 individuals, and there may be the ability to file an  
10 action in the event that, you know, something occurs  
11 that's contrary to the ADA.

12 Q. Are there currently actions being contemplated  
13 on behalf of individuals by Access with Success,  
14 Incorporated?

15 A. I don't know the answer to that.

16 Q. Do you participate in those kinds of discussions  
17 as a member of Access with Success, Incorporated?

18 A. No, I don't.

19 Q. Okay. Does Access with Success, does it have  
20 formal discussion-type events? That is does it hold --  
21 I'll give you a simple example. Does it hold things like  
22 a convention where they rent a space and invite people to  
23 come and attend and --

24 A. I haven't heard of any such event being noticed.

1 Q. I don't mean this to in any way trivialize  
2 Access with Success, but do they, you know, sell things  
3 like an Access with Success T-shirt or --

4 A. I don't know.

5 Q. Okay.

6 A. I've never seen one.

7 Q. Do you know what the source of income --  
8 operating income for Access with Success is?

9 A. I don't know that there is any.

10 Q. Do you know if it has any salaried employees?

11 A. I don't believe it does.

12 Q. Does it have an office?

13 A. I assume it does.

14 Q. Where would that office be?

15 A. There's an address in Dracut, Massachusetts that  
16 I heard counsel mention previously, and I'll assume that  
17 that's the address of their -- their office, if there is  
18 one.

19 Q. That would be Mr. Frotton's --

20 A. Yes.

21 Q. -- home or his address?

22 A. Uhm-uhm.

23 Q. Have you read the complaint, the amended  
24 complaint and jury demand, in this action, Mr. Theodore?

1 A. Yes, I have.

2 Q. Let me ask one of those lawyer questions. Have  
3 you reviewed any documents prior to coming here today to  
4 testify on behalf of Access with Success?

5 A. I reviewed the complaint briefly, took a look at  
6 it, and I don't know that it was in anticipation of this  
7 event. I think I may have just looked at it in looking  
8 at other complaints as well. And I've looked at some  
9 other papers, too.

10 Q. What other papers have you looked at?

11 A. I looked at actually a ruling from a federal  
12 court judge on a motion, and I don't know the particulars  
13 to it, but I just read pretty much the law and the ruling  
14 per se.

15 Q. Is this a published opinion?

16 A. I don't know that it's published or not.

17 Q. Do you know the name of the case in which the  
18 ruling was?

19 A. I believe Mr. Spalluto was a party to the action  
20 but I don't know -- I don't know the name of the case,  
21 sorry.

22 Q. Do you know the court in which the case was  
23 pending?

24 A. It was a federal court.

1 Q. Was it in Massachusetts?

2 A. Yes.

3 Q. All right. And you don't know the name of the  
4 defendant in that action?

5 A. No, I didn't catch the defendant's name, I'm  
6 sorry.

7 Q. Do you happen to know the name of the judge who  
8 wrote the -- issued the ruling?

9 A. No, I don't, I'm sorry.

10 Q. Okay. In addition to that document and the  
11 complaint, what other documents have you reviewed prior  
12 to -- in preparation for testifying here today?

13 A. I can't name any specifically.

14 Q. An answer like that suggests to me that I should  
15 ask you, could you think of any generally, like  
16 categories of documents that you looked at?

17 A. Aside from the two that I mentioned, I looked at  
18 a list of certain individuals that are our members. And  
19 I didn't take much of a look at it, just kind of breezed  
20 through it.

21 Q. How many members does Access with Success,  
22 Incorporated, have?

23 A. I'm going to have to guess and I hate to.

24 Q. I don't want you to guess, but your best

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1 understanding will do.  
 2 A. My best estimate will be between 15 and 25.  
 3 Q. Okay. And I think I asked you this and if I  
 4 did, forgive me, but there are no annual dues or --  
 5 A. There are no dues to be a member, I'm sure of  
 6 that.  
 7 Q. Okay. One other thing -- I don't like to bounce  
 8 around, but does Access with Success, does it have any  
 9 sort of an advocacy function? And what I mean by that is  
 10 does it address legislative bodies or make proposals as  
 11 to pending legislation or regulations, regulatory bodies  
 12 and regulations?  
 13 A. I don't know.  
 14 Q. Okay. With regard to the complaint, the  
 15 complaint mentions in the first numbered paragraph -- I  
 16 have another copy of it if it would be helpful for you to  
 17 follow along.  
 18 A. Yes, it would. Thank you.

19 MR. McMENIMEN: I don't think I  
 20 need to mark it. I mean we can agree -- or tell me if we  
 21 can agree --

22 MR. GUERRERA: You can just mark  
 23 it.  
 24 MR. McMENIMEN: All right. Well,

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1 let's mark it then. Let's mark it as Exhibit 3.  
 2  
 3 (Exhibit No. 3 Amended Complaint and Jury Demand marked)  
 4  
 5 Q. You may take all the time you want to look at  
 6 that, but if you've looked at it before let me know --  
 7 let me know when you're ready to answer some questions  
 8 about it, let me put it that way.  
 9 A. You can go ahead and ask.

10 Q. Okay. Prior to the filing of this complaint,  
 11 which is captioned an amended complaint, there had been  
 12 an earlier complaint filed against an entity called  
 13 Bakey's, Incorporated, under this docket number, were you  
 14 aware of that?

15 A. Prior to this particular case?

16 Q. Yes. Prior to Peter A. Spalluto and Access with  
 17 Success, Incorporated., plaintiffs versus HDP, Inc.,  
 18 defendant, with this docket number, there had been an  
 19 initial complaint or first complaint with the party --  
 20 the defendant being identified as Bakey's, Incorporated.  
 21 Were you familiar with that?

22 A. I remember having some discussions about a case  
 23 but I don't know the -- you know, the procession, the  
 24 actual chain of events and which was filed and which

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1 wasn't filed, but I'm familiar and I have had discussions  
 2 with counsel about this case in the past.  
 3 Q. Okay. In the paragraph numbered one under the  
 4 heading parties, it is recited that one of the members of  
 5 Access with Success is a person by the name of Felix  
 6 Esposito. Do you know Felix Esposito?  
 7 A. No. Other than the name, no. I've seen the  
 8 name.  
 9 Q. But you don't -- you've never had any personal  
 10 contact with him, I take it?  
 11 A. No, I haven't.  
 12 Q. Do you know if he has any particular official  
 13 function with Access with Success, Incorporated?  
 14 A. No, I don't.  
 15 Q. It mentions an individual named Mr. G. David  
 16 Iverson, I-V-E-R-S-O-N. And the complaint asserts that  
 17 he is a member. Do you know Mr. Iverson?  
 18 A. Personally I don't know him. I've never met  
 19 him, no.  
 20 Q. It next mentions the individual plaintiff in the  
 21 action, Mr. Peter A. Spalluto, S-P-A-L-L-U-T-O. Do you  
 22 know Mr. Spalluto?  
 23 A. I don't know him personally, never met him, but  
 24 I've seen, you know, different postings online, you know,

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1 discussions, et cetera, and I know him with respect to  
 2 this case.  
 3 Q. Okay. That is, if I understand you correctly,  
 4 please tell me if I do understand you correctly, you've  
 5 seen his name as he is a plaintiff in this action and  
 6 you're generally familiar with the complaint; am I right?  
 7 A. Yes. I've seen his name on other actions as  
 8 well.  
 9 Q. Okay. And you mentioned one earlier in the  
 10 federal court in Boston, an action which you saw an  
 11 opinion or a ruling by a district court judge?  
 12 A. Yes.  
 13 Q. But you just said other actions as well?  
 14 A. Yes.  
 15 Q. So are you aware of any other actions besides  
 16 this one and that one that Mr. Spalluto is a party to?  
 17 A. No, I'm not aware of any, but he may be a party  
 18 with other Access cases and I may have not seen his name  
 19 on the complaints so I'm not aware of any.  
 20 Q. When you say he may be a party along with -- in  
 21 some other Access cases and you may not have seen his  
 22 name, are you talking about other Access cases like the  
 23 ones we've earlier described, the seven or so?  
 24 A. Yes.

1 Q. Okay. Just so that I understand what you're  
 2 saying, are you aware of any other actions in which Mr.  
 3 Spalluto is a party, whether or not Access with Success  
 4 is also a party?

5 A. No.

6 Q. Okay. With regard to the people whom I have  
 7 just talked with you about, Felix Esposito, Mr. Iverson,  
 8 and Mr. Spalluto, do you know if there is somebody in  
 9 Access with Success, Incorporated, who does have personal  
 10 contact with them?

11 A. No.

12 Q. Would Mr. Frotton know, as far as you know?

13 A. I don't know.

14 Q. Okay. The next named person on the second page  
 15 is Scott M. Frotton, F-R-O-T-T-O-N, who is identified as  
 16 a founding member of AWS, and I represent to you that  
 17 stands for Access with Success. Do you know Mr. Frotton?

18 A. I've seen his name many times.

19 Q. Have you ever met him?

20 A. No, I haven't.

21 Q. Okay. Have you communicated with him via e-mail  
 22 or through websites or any such thing, if you know?

23 A. I've been -- I've communicated with him through  
 24 e-mail, with him through e-mails as a second party,

1 Q. -- less than halfway down?

2 A. Yes.

3 Q. Do you know Mr. Aziz?

4 A. Other than having seen him on documents, AWS  
 5 documents, no.

6 Q. When you say you've seen him on AWS documents,  
 7 what kind of documents are you referring to?

8 A. Just membership paraphernalia, other complaints  
 9 I think I've seen his name on as a member and as a  
 10 complaining party.

11 Q. When you say "a complaining party," do you mean  
 12 a plaintiff?

13 A. Yes.

14 Q. What cases do you recall Mr. Aziz being a  
 15 plaintiff in?

16 A. I can't specifically say and I hate to assume  
 17 but --

18 Q. I don't want you to assume, but what's your best  
 19 understanding?

20 A. My best understanding would be that he would  
 21 probably be included in the cases that we previously  
 22 discussed.

23 Q. Okay. The next name I see about halfway down  
 24 the page is Norman P. -- forgive me -- Mr. Crescimano, I

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1 perhaps as a CC or as a forwarded e-mail or something in  
 2 that capacity.

3 Q. I take it from your answer then that you've  
 4 never had a conversation either electronically or  
 5 verbally with Mr. Frotton?

6 A. That's correct.

7 Q. And the same could be said of the earlier  
 8 individuals that I've mentioned?

9 A. That's correct.

10 Q. The next one that I see is Mr. Francis DeVito.  
 11 He's four lines down on the second page.

12 A. Yes, I see it.

13 Q. Do you know Mr. DeVito?

14 A. No, I don't.

15 Q. Have you ever met Mr. DeVito?

16 A. No, I haven't.

17 MR. GUERRERA: That's him up

18 there.

19 MR. McMENIMEN: Thank you for

20 that.

21 Q. The next person whom I see is a Mr. Raymond J.  
 22 Aziz. I hope I'm not mispronouncing his name. It's  
 23 A-Z-I-Z. Do you see that --

24 A. Yes.

1 believe it is, which is C-R-E-S-C-I-M-A-N-O. Do you see  
 2 that?

3 A. Yes, I do.

4 Q. And did I read it correctly?

5 A. I don't know if you read it correctly but --

MR. GUERRERA: You did.

6 Q. Do you know Mr. Crescimano?

7 A. No, I don't.

8 Q. Have you had any contact with him either via  
 9 e-mail or correspondence in some other form?

10 A. I don't know, perhaps by e-mail. As I said a  
 11 lot of the communications are done via the Internet.

12 Q. Okay. And, again, that would be if he were on a  
 13 copy list or you were on a CC list?

14 A. Sure.

15 Q. Okay. The next name, a line down from Mr.  
 16 Crescimano, is Mr. Frank Salafia. That's S-A-L-A-F-I-A.

17 Do you know Mr. Salafia?

18 A. No, I don't.

19 Q. Do you know -- it says he's a member of Access  
 20 with Success. Do you know that he's a member of Access  
 21 with Success?

22 A. Yes, I do.

23 Q. And how do you know that?

1 A. I believe I saw a copy of his membership form at  
 2 one point.  
 3 Q. Okay. Where would that have been?  
 4 A. That -- I believe it was -- I obtained it  
 5 through discussions with counsel. I've actually seen it.  
 6 Q. Okay. Do you mean Mr. Guerrera?  
 7 A. Yes.  
 8 Q. Okay. The next person is Amylee, that's  
 9 A-M-Y-L-E-E, all one word, O'Beirne, that's O,  
 10 apostrophe, B-E-I-R-N-E. Do you know Ms. O'Beirne?  
 11 A. No, I don't.  
 12 Q. It indicates that she is a founding member of  
 13 Access with Success. Is that -- do you have any  
 14 understanding one way or another of whether that's true?  
 15 A. I accept it as true.  
 16 Q. Okay. The next person is the -- I was going to  
 17 say the ubiquitous but that's not the word -- it's  
 18 yourself, isn't it --  
 19 A. Yes, it is.  
 20 Q. -- Dino N. Theodore?  
 21 A. Yes.  
 22 Q. Next is John Pattavina, P-A-T-T-A-V-I-N-A. Do  
 23 you know Mr. Pattavina?  
 24 A. No, I don't.

1 Q. Ever had any contact with him that you're aware  
 2 of?  
 3 A. Perhaps through e-mail, much the same as the  
 4 previous discussions that we've had.  
 5 Q. Okay. If you go to the last page of the  
 6 complaint, you will see that there's an electronic  
 7 signature block for a wonderful woman and a fine lawyer  
 8 who I met before by the name of Ann Marie Pattavina.  
 9 A. Yes.  
 10 Q. Do you know Ann Marie Pattavina?  
 11 A. No.  
 12 Q. Okay. Then do you know whether she is related  
 13 to John Pattavina?  
 14 A. No, I don't know.  
 15 Q. Okay. The next name that I see on -- going back  
 16 to page 2 -- is Peter DiPalma. And that's capital D-I,  
 17 capital P-A-L-M-A. And that's about five lines up from  
 18 the bottom of page 2. Do you know Mr. DiPalma?  
 19 A. No, I don't.  
 20 Q. Ever met him?  
 21 A. No.  
 22 Q. Okay. The next name a line down is Robert  
 23 Brearley. That's capital B-R-E-A-R-L-E-Y. Do you know  
 24 Mr. Brearley?

1 A. Other than as a member of AWS, no.  
 2 Q. Well, when you say other than as a member of  
 3 AWS, are you saying that you've seen his name on a  
 4 membership of some sort?  
 5 A. I know that he is a member. I've seen him on  
 6 complaints that have been drafted.  
 7 MR. GUERRERA: That's him up  
 8 there.  
 9 Q. Are these complaints for pending actions or  
 10 completed actions different from those that we've already  
 11 talked about, the seven or eight?  
 12 A. No.  
 13 Q. I think what you're saying -- tell me if I'm  
 14 correct, that he was also a party or identified in some  
 15 of the lawsuits that Access with Success is a plaintiff  
 16 in?  
 17 A. I believe he was, yes.  
 18 Q. The next name, third from the bottom line, is  
 19 Robert L. Smith. Do you know Mr. Smith -- Robert L.  
 20 Smith, III, I believe?  
 21 A. No, I don't know him personally.  
 22 Q. Okay. With respect to the complaint, paragraph  
 23 3, the second sentence says that, "Access with Success  
 24 has also been discriminated against because of its

1 association with its members and their claims."  
 2 On behalf of Access with Success,  
 3 Incorporated, can you tell me how the corporation has  
 4 been discriminated against because of its association  
 5 with its members and their claims?  
 6 A. Well, I didn't draft the complaint.  
 7 Q. I understand that, but I'm asking you as a  
 8 spokesperson for AWS.  
 9 A. How -- could you repeat the question again?  
 10 Q. Yes. Would you tell me how -- can you give me  
 11 an example of how AWS has been discriminated against  
 12 because of its association with its members and their  
 13 claims?  
 14 A. Well, the allegations listed in the complaint  
 15 affect individuals that have certain disabilities and  
 16 these individuals that are mentioned in this complaint  
 17 have those disabilities. So the discrimination that is  
 18 alleged affects and impacts the individuals listed as  
 19 complainants in this case. So that in and of itself is  
 20 the discrimination. I don't know if that answers your  
 21 question.  
 22 Q. Is your answer -- are you saying that Access  
 23 with Success, Incorporated, has been the victim of  
 24 discrimination because some of its members have been

1 denied access to places of public accommodation?

2 A. In different situations, yes.

3 Q. Okay. Do you know of any other way other than  
4 that derivative -- I'm going to call it derivative and  
5 you can quarrel with me if you want but if we understand  
6 it -- other than that way do you know of any other way in  
7 which Access with Success, Incorporated, has been the  
8 victim of discrimination?

9 A. When you say Access with Success you mean as a  
10 corporate entity --

11 Q. Yes.

12 A. -- or the individuals that are associated with  
13 or are members of Access with Success?

14 Q. The corporate entity.

15 A. The corporate entity itself has been  
16 discriminated against?

17 Q. I'm asking you how it has other than through the  
18 derivative way, that is by having its members having been  
19 denied accessibility to places of public accommodation?

20 A. I don't know the answer to that --

21 MR. GUERRERA: It's a  
22 representative of its members.

23 MR. McMENIMEN: Yeah.

24 MR. GUERRERA: That's the

1 Theodore, I'm not asking you legal opinions. I'm asking

2 you for any factual basis as a spokesperson for the  
3 corporation. Are you and I clear on that?

4 A. Yes.

5 Q. Okay. I don't want to argue these issues with  
6 counsel. I'm looking for the answers to deposition  
7 questions.

8 MR. GUERRERA: I think they were  
9 calling for legal opinions but --

10 MR. McMENIMEN: You can think what  
11 you want.

12 MR. GUERRERA: I object to the  
13 form of the question on that basis.

14 MR. McMENIMEN: You're entitled to  
15 object and you're entitled to put an objection on record,  
16 but that's about all you're entitled to do.

17 MR. GUERRERA: Well, I've done  
18 that.

19 Q. On behalf of Access with Success, Incorporated,  
20 as its designated spokesperson, going to paragraph 16 of  
21 numbered -- paragraph numbered 16 of the complaint, do  
22 you see that?

23 A. Yes, I do.

24 Q. Okay. You have it before you, right?

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1 essential nature.

2 MR. McMENIMEN: Well, I understand  
3 and I don't want to quarrel. I'm just trying to ask --

4 MR. GUERRERA: You're getting into  
5 legal questions, but I can quote Southside Fair Housing  
6 Commission versus City of New York --

7 MR. McMENIMEN: Well --

8 MR. GUERRERA: 928 F.2d 1336, "An  
9 Association may have standing solely as the  
10 representative of its members provided it alleges its  
11 members or any one of them are suffering immediate or  
12 threatened injury as a result of the challenged action."  
13 It's a 1991 case out the second circuit.

14 MR. McMENIMEN: Well, I appreciate  
15 that and I don't wish to argue legal issues with you.

16 MR. GUERRERA: But those are the  
17 kind of questions the witness is getting.

18 MR. McMENIMEN: I'm trying --

19 MR. GUERRERA: And he is a lawyer,  
20 but you're asking for legal questions.

21 MR. McMENIMEN: I'm trying to  
22 conduct a deposition of Access with Success,  
23 Incorporated.

24 Q. Just so that we're clear going forward, Mr.

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1 A. Yes.

2 Q. Paragraph 16 begins with the sentence, "On  
3 September 7, 2004, Mr. Spalluto visited Boston and  
4 planned to have lunch with friends at Bakey's." Did I  
5 read that correctly?

6 A. Yes, you did.

7 Q. Do you know the purpose of Mr. Spalluto's visit  
8 to Boston on September 7, 2004?

9 A. It says he planned to have lunch with his  
10 friends at Bakey's.

11 Q. No. I'm asking you if you as the spokesperson  
12 for Access with Success, Incorporated, have any knowledge  
13 of what Mr. Spalluto's business in Boston was on  
14 September 7, 2004?

15 A. Other than planning to have lunch at Bakey's I  
16 don't know of any other reason why.

17 Q. What is the basis for your knowledge that he was  
18 planning on having lunch on September 7, 2004, at  
19 Bakey's?

20 A. Well, I'm relying on the No. 16 that you pointed  
21 to in the complaint.

22 Q. The complaint. You didn't draft this complaint,  
23 you said?

24 A. Oh, no, I didn't.

1 Q. Independent of the fact that that sentence  
 2 appears in this complaint, do you have any knowledge of  
 3 the facts that form the basis for the assertion that Mr.  
 4 Spalluto visited Boston on September 7, 2004, and planned  
 5 to have lunch with friends at Bakey's?

6 A. No, I don't.

7 Q. The next sentence in paragraph 16 says, "He,"  
 8 meaning Mr. Spalluto, "called ahead to find out whether  
 9 he could get inside and be served at a table in his  
 10 electric wheelchair."

11 Do you have any knowledge as the  
 12 30(b)(6) spokesperson for Access with Success,  
 13 Incorporated, as to -- let me strike the question and ask  
 14 it a more proper way.

15 What is the basis of Access with  
 16 Success, Incorporated's knowledge that Mr. Spalluto  
 17 called ahead to find out whether he could get inside and  
 18 be served at a table in his electric wheelchair?

19 A. What is the basis? The basis is that Mr.  
 20 Spalluto indicated that this is what occurred.

21 Q. To whom did he indicate that?

22 A. Well, he indicated it to whoever filed this  
 23 complaint, and he also indicated it to members of Access  
 24 with Success.

1 Q. Who are the members of Access with Success that  
 2 he indicated it to?

3 A. I can't answer that question because I don't  
 4 know.

5 Q. As the spokesperson for Access with Success, you  
 6 don't know who at Access with Success Mr. Spalluto spoke  
 7 to?

8 A. Who at Access with Success? No, I don't.

9 Q. The next sentence of paragraph 16 says that,  
 10 "He," referring to Mr. Spalluto, "was told that this  
 11 would be no problem because there is an accessible side  
 12 entrance."

13 Now, do you know what the basis  
 14 for that assertion is as the spokesperson for Access with  
 15 Success, Incorporated?

16 A. It's based on what Mr. Spalluto said.

17 Q. And certainly it's nothing he ever said to you,  
 18 you'll agree with me. He never said it to you  
 19 personally, right?

20 A. Well, I never had any discussions with Mr.  
 21 Spalluto.

22 Q. Okay. So you would assume that that's something  
 23 Mr. Spalluto said because it appears in this complaint;  
 24 is that a fair statement?

1 A. I don't assume it. I accept it as true given  
 2 the fact that he attested to it in filing his complaint.

3 Q. Do you see any attestation anywhere?

4 A. Well, he filed a complaint and I know he had  
 5 attorneys sign it so I would hope that he filed it, you  
 6 know, truthfully. I mean given any complaint on any day  
 7 a lawyer relies on the truthfulness of the client in the  
 8 filing.

9 Q. No doubt.

10 A. And as an attorney you would know that.

11 Q. But you have no personal knowledge and no  
 12 knowledge as the 30(b)(6) spokesperson of Access with  
 13 Success, Incorporated, as to those incidents; that is,  
 14 Mr. Spalluto's visiting Boston, Mr. Spalluto's planning  
 15 to have lunch at Bakey's, Mr. Spalluto's calling ahead to  
 16 find out if he could get inside, and Mr. Spalluto being  
 17 told there would be no problem?

18 A. Right, exactly, I don't have any knowledge as to  
 19 those circumstances.

20 Q. If you would go to paragraph No. 24 of the  
 21 complaint. The last sentence of paragraph 24 recites,  
 22 "On information and belief, HDP," that's the defendant,  
 23 "has made renovations since January 26, 1992, such that  
 24 including accessibility features was mandatory."

1 First of all, did I read that  
 2 sentence correctly?

3 A. Yes.

4 Q. And what is the information that Access with  
 5 Success, Incorporated, has that HDP has made renovations  
 6 since January 26, 1992, such that including accessibility  
 7 features was mandatory?

8 A. I don't know the information.

9 Q. All right. Who at Access with Success,  
 10 Incorporated, would have that information?

11 A. I don't know.

12 Q. Do you know if anybody does have such  
 13 information?

14 A. No, I don't.

15 Q. As the spokesperson for Access with Success,  
 16 Incorporated, what do you know about the circumstances of  
 17 Mr. Spalluto's visit to Boston on September 7, 2004?

18 A. I know that he was not able to access Bakey's on  
 19 Broad Street in Boston. I know that it would have been  
 20 impossible for him to access Bakey's in Boston.

21 Q. How do you know that?

22 A. Because I know that Bakey's in Boston does not  
 23 provide accessibility for a person in his physical  
 24 condition.

1 Q. And how do you know that Bakey's does not  
 2 provide accessibility?

3 A. Well, I've visually seen Bakey's and the way  
 4 it's set up and there is actually I believe three  
 5 different sets of stairs, if my recollection is correct,  
 6 and given the fact that there are steps leading into the  
 7 building would be impossible for Mr. Spalluto to enter  
 8 the building.

9 Q. Now, when did you inspect the outside or the  
 10 exterior of the building?

11 A. Well, I was -- I've actually seen the building.  
 12 on many occasions as early as 1993 and up to including  
 13 recently I think I saw a photograph recently. Prior to  
 14 that I've been in the neighborhood, many times I've  
 15 passed the building, and I can attest to the fact that  
 16 there are stairs leading in and there is no access for a  
 17 person in Mr. Spalluto's condition.

18 Q. Okay. Have you ever been inside Bakey's?

19 A. I wouldn't be able to gain -- get inside of  
 20 Bakey's.

21 Q. Your answer is no, you've never been inside  
 22 Bakey's?

23 A. No, I've never been permitted to go inside  
 24 Bakey's.

1 Q. All right. As far as you know has Mr. Spalluto  
 2 ever been inside Bakey's?

3 A. I don't know that he has. I don't know that he  
 4 would be able to get inside Bakey's.

5 Q. Going to page 8 of the complaint let me just --  
 6 tell me when you get there.

7 A. We're there.

8 Q. At paragraph 33 there is a factual assertion;  
 9 "The doors in several of the building entrances are  
 10 fitted with inaccessible hardware at the facility in  
 11 violation of" a section of the Americans with  
 12 Disabilities Act Guidelines. Did I paraphrase that in  
 13 substance correctly?

14 A. Yes. Yes, you did.

15 Q. Who at Access with Success, Incorporated, would  
 16 have made the determination that the doors were fitted  
 17 with inaccessible hardware on September 7, 2004?

18 A. Well, Mr. Spalluto would be able to.

19 Q. Well, do you know that to be the case?

20 A. Well, from what I've seen, yes, the entrances  
 21 are fitted with inaccessible hardware.

22 Q. And that's based on your own visual inspection?

23 A. My observations.

24 Q. All right. Paragraph 34 recites, "There are

1 rises at the thresholds of the entrances at the facility  
 2 in excess of three-quarters of an inch" and in violation  
 3 of Americans with Disabilities Act Guidelines. Did I  
 4 paraphrase that in substance?

5 A. Yes, you did.

6 Q. Who on behalf of Access with Success,  
 7 Incorporated, measured the thresholds and determined that  
 8 they were in excess of three-quarters of an inch --

9 A. I don't know.

10 Q. -- on September 7?

11 A. I don't know who measured them.

12 Q. Who would know, do you know?

13 A. I don't know who would know. Perhaps whoever  
 14 the person was that was -- that did the measurement would  
 15 know, but I don't know.

16 Q. And you have no knowledge whatsoever as to who  
 17 the person was that did the measurement; is that correct?

18 A. I believe there was -- I may have looked at a  
 19 document. I think there was an inspection done at some  
 20 point in time. I reviewed a document which indicated  
 21 there was an inspection done.

22 Q. Was that inspection conducted prior to the  
 23 filing -- prior to the drafting of this complaint, if you  
 24 know?

1 A. I don't think it was. I think it was done in  
 2 conjunction with or post the filing of the complaint, but  
 3 I did read -- I do recall reading an actual inspection  
 4 that was done by either someone hired or directed or  
 5 instructed by Access with Success or someone hired for  
 6 the defendant. I'm not sure, either or. My recollection  
 7 isn't that clear on it.

8 Q. Well, if such an inspection were done, and I  
 9 represent to you that it was --

10 A. Okay.

11 Q. -- but if it were done after the complaint had  
 12 been drafted and filed, then that inspection would not be  
 13 the source of the assertion that the rises in the  
 14 thresholds at the entrances of the facility were in  
 15 excess of three-quarters of an inch, do you follow me?

16 A. I'm following you, yes.

17 Q. So my question is what knowledge do you have as  
 18 spokesperson for Access with Success as to who  
 19 measured -- on September 7, 2004, who measured the  
 20 thresholds and found them to be in excess of  
 21 three-quarters of an inch?

22 A. Where it is that you're seeing September 7 that  
 23 this measurement was taken?

24 Q. If you look at paragraph No. 30 at the top of

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1 page 8 --  
 2 A. Yes.  
 3 Q. -- do you see where it says, "Upon arriving for  
 4 his visit on September 7, 2004, Mr. Spalluto observed and  
 5 encountered the architectural barriers to access set  
 6 forth below." Did I read that correctly?  
 7 A. Yes.  
 8 Q. Four paragraphs down from that there is an  
 9 assertion that the rises at the thresholds of the  
 10 entrances were in excess of three-quarters of an inch; do  
 11 you see that?  
 12 A. Yes.  
 13 Q. So my question is on September 7, 2004, who  
 14 measured the thresholds to determine that they were in  
 15 excess of three-quarters of an inch?  
 16 A. I don't know.  
 17 Q. If you go to paragraph 37 you see the assertion,  
 18 "The interior doors in several locations of the building  
 19 require excessive force to open in violation of" the  
 20 Americans with Disabilities Act Accessibility Guideline.  
 21 Did I read that accurately?  
 22 A. Yes.  
 23 Q. Semi-accurately?  
 24 A. Well, that's the way it seems to be written to

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1 me, yes.  
 2 Q. And that -- who measured -- who determined that  
 3 when Mr. Spalluto got to Bakesy's on September 7, 2004,  
 4 the interior doors required excessive force?  
 5 A. I don't know.  
 6 Q. Who on behalf of Access with Success,  
 7 Incorporated, would know?  
 8 A. I don't know who would know that. I'm assuming  
 9 that this is all as a result of, you know, some  
 10 examination that was done.  
 11 Q. Okay. Who did that examination is what I'm  
 12 trying to get at?  
 13 A. I don't know who did it.  
 14 Q. Do you know if anybody at Access with Success,  
 15 Incorporated, knows who did it?  
 16 A. I'm sure somebody would know who did it, but I'm  
 17 not the person.  
 18 Q. Well, can you tell me who that person might be?  
 19 A. No, I can't.  
 20 Q. Okay. Paragraph 38 says that, "The stairs  
 21 provided at the facility do not comply with the standards  
 22 prescribed" in a section of the Guidelines, right? And,  
 23 again, you don't know who conducted those measurements,  
 24 do you?

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1 A. Well, it doesn't say there were any  
 2 measurements. It just says they don't comply with the  
 3 standards prescribed in 4.9 of the ADAAG.  
 4 Q. Well, if those were interior stairs --  
 5 A. It doesn't say either or though. I mean it  
 6 could be the stairs just facing the building and I could  
 7 tell you that those stairs do not comply with the  
 8 standards prescribed.  
 9 Q. If you turn the page and go to paragraph 49 --  
 10 excuse me, if you turn to page 9 and go to paragraph 41  
 11 there is an assertion -- do you have it, Mr. Theodore?  
 12 A. 41, yes.  
 13 Q. "There are protruding objects present throughout  
 14 the facility." Did I read that?  
 15 A. Yes.  
 16 Q. And you've never been in the facility so you  
 17 didn't make that observation, did you?  
 18 A. No, I'm not able to get into the facility.  
 19 Q. And as far as you know based upon the testimony  
 20 you've given so far today, Mr. Spalluto hasn't been  
 21 inside the facility either?  
 22 A. I don't know that he has or hasn't, but I don't  
 23 believe that he has.  
 24 Q. Since that assertion appears in the complaint,

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1 the observation had to have been made prior to the  
 2 drafting of the complaint; you'll agree with me on that,  
 3 won't you?  
 4 A. I don't understand the question.  
 5 Q. Well, since the assertion is -- since the  
 6 assertion that there are protruding objects present  
 7 throughout the facility, that facility being Bakesy's,  
 8 since that appears in the complaint, since that factual  
 9 assertion appears in the complaint, the observation  
 10 forming the basis for that factual assertion had to be  
 11 made before the complaint was drafted, you'll agree with  
 12 me on that, won't you?  
 13 A. I can't agree with you either way on that. I  
 14 don't know that it's been made before the complaint was  
 15 drafted.  
 16 Q. Well, since it appears in the complaint it has  
 17 to have occurred before the complaint was drafted or it  
 18 was made up, wouldn't you agree with me?  
 19 A. No, I can't agree with you on -- I don't know --  
 20 I don't understand the question actually. It's a bit  
 21 confusing.  
 22 Q. I'll try not to -- I promise you I'm not trying  
 23 to confuse you.  
 24 If you look at the last page of

1 the complaint, it bears the date February 1, 2006; do you  
 2 see that?

3 A. Yes.

4 Q. So we know -- if that date is accurate, the  
 5 complaint was drafted on or before February 1, 2006,  
 6 would you agree with me?

7 A. Yes.

8 Q. And the complaint, as it was drafted, contains  
 9 the assertion that there are protruding objects present  
 10 throughout the facility, am I right?

11 A. Yes.

12 Q. Now, if that assertion was based upon  
 13 observations, they couldn't have been made after the  
 14 complaint was drafted because if they had been made after  
 15 they wouldn't have appeared in the complaint, right?

16 A. Right.

17 Q. So my question to you is: Who prior to the  
 18 drafting of the complaint made those observations on  
 19 behalf of Access with Success, Incorporated?

20 A. Well, I don't know. There's a mentioning of  
 21 some friends that he had met, perhaps they were the  
 22 friends. I don't know who made the observations.

23 Q. Do you know who the friends were?

24 A. No.

1 Q. Anybody at Access with Success to your knowledge  
 2 who might know who the friends were other than Mr.  
 3 Spalluto?

4 A. No.

5 Q. Insofar as there are assertions in this  
 6 complaint as to conditions in the interior of the  
 7 premises, insofar as you've never been inside the  
 8 premises, and insofar as to the best of your knowledge  
 9 Mr. Spalluto has never been inside the premises, can you  
 10 tell me who would have made the observations about the  
 11 interior of the premises that appear in the complaint  
 12 filed on behalf of Access with Success, Incorporated?

13 A. No, I can't.

14 Q. And apart from Mr. Spalluto, do you know of  
 15 anyone who has personal knowledge of the matters alleged  
 16 in the complaint?

17 A. Other than the drafters of the complaint?

18 Q. Well, if the drafters of the complaint were  
 19 lawyers, they would have relied upon what their clients  
 20 told them.

21 A. Sure.

22 Q. And you already told me that.

23 A. Sure, yup.

24 Q. So I'm talking about the identity of persons who

1 had personal knowledge of the matters alleged in the  
 2 complaint.

3 Apart from Mr. Spalluto, do you  
 4 know anybody who has personal knowledge of the matters  
 5 asserted in this complaint?

6 A. Well, yes.

7 Q. Who?

8 A. I have personal knowledge.

9 Q. And what is your personal knowledge?

10 A. I have observed Bakey's and I've observed the  
 11 exterior of the premises and I know that the premises are  
 12 not accessible to someone in a wheelchair.

13 Q. Okay. Who else besides you and Mr. Spalluto,  
 14 presumably, has personal knowledge of the matters alleged  
 15 in this complaint?

16 A. Well, anybody that's listed on the complaint  
 17 that has read the complaint would have knowledge.

18 Q. Personal knowledge, Mr. Theodore --

19 A. Personal knowledge.

20 Q. -- based upon observation?

21 A. Based upon actual observations?

22 Q. Yes, sir.

23 A. I can't answer the question. I don't know.

24 Q. Do you know if somebody on behalf of Access with

1 Success, Incorporated, would know?

2 A. Of others that have personal knowledge --

3 Q. Right.

4 A. -- of observations, no.

5 MR. McMENIMEN: That's all I have,  
 6 Mr. Theodore. Thank you very much for your patience.

7 THE WITNESS: It's been my  
 8 pleasure.

9 MR. McMENIMEN: You might not be  
 10 through. Do you have any questions?

11 MR. GUERRERA: No.

12 (Discussion off the record)

13 MR. McMENIMEN: For the record, I  
 14 may upon reviewing this transcript be required to seek a  
 15 further deposition of Access with Success, Incorporated,  
 16 to find a spokesperson who has knowledge of some of the  
 17 matters contained in Schedule A that Mr. Theodore does  
 18 not have any knowledge of. I just want to put that on  
 19 this particular transcript.

20 (Whereupon, the deposition was  
 21 concluded at 11:38 a.m.)

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CERTIFICATE

I, DINO N. THEODORE, do hereby certify that I have read the foregoing transcript of my testimony, and further certify under the pains and penalties of perjury that said transcript is a true and accurate record of said testimony.

Dated at \_\_\_\_\_

this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

DINO N. THEODORE

Signed under the pains  
and penalties of perjury

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ERRATA SHEET

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Kimberly A. McGonagle  
Registered Professional Reporter  
CSR No. 110393

My commission expires  
on May 3, 2013

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19 Total Case matches for selection ACCESS WITH SUCCESS, INC 01/01/2000 to 03/13/2000  
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Name	Court	Case No.	Filed
ACCESS WITH SUCCESS, INC.	madce	1:2004cv10249	02/05/2004
Spalluto v. KSA Realty Trust			
ACCESS WITH SUCCESS, INC.	madce	1:2005cv10314	02/16/2005
Theodore v. Demoulas Supermarkets, Inc.			
ACCESS WITH SUCCESS, INC.	madce	1:2005cv10349	02/22/2005
Esposito v. Best Western International Inc.			
ACCESS WITH SUCCESS, INC.	madce	1:2003cv10351	02/24/2003
Access With Success,, et al v. Vlahakis, et al			
ACCESS WITH SUCCESS, INC.	madce	1:2005cv10384	02/28/2005
Esposito v. Prime Hospitality Corp.			
ACCESS WITH SUCCESS, INC.	madce	1:2005cv10385	02/28/2005
Spalluto v. Bakey's Incorporated			
ACCESS WITH SUCCESS, INC.	madce	1:2005cv10411	03/04/2005
Brearley v. City of Methuen, Massachusetts			
ACCESS WITH SUCCESS, INC.	madce	1:2006cv10982	06/05/2006
Smith v. R.J. Fitz Limited Partnership			
ACCESS WITH SUCCESS, INC.	madce	1:2006cv11195	07/11/2006
Smith v. Pier View Restaurant, Inc.			
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Smith v. Harbor Watch Inn, Ltd.			
ACCESS WITH SUCCESS, INC.	madce	1:2006cv11268	07/24/2006
Smith v. Haskell			
ACCESS WITH SUCCESS, INC.	madce	1:2006cv11286	07/26/2006
Theodore v. Wyndham Hotels and Resorts, L.L.C.			
ACCESS WITH SUCCESS, INC.	madce	1:2006cv11647	09/13/2006
Smith v. The Druker Company, Ltd.			
ACCESS WITH SUCCESS, INC.	madce	1:2004cv11654	07/26/2004
Iverson v. Omni Boston Corporation			
ACCESS WITH SUCCESS, INC.	madce	1:2003cv11668	09/08/2003
Access With Success, Inc. v. City of Lawrence			
ACCESS WITH SUCCESS, INC.	madce	1:2003cv11729	09/09/2003
Frotton v. Town of Dracut, Massachusetts			
ACCESS WITH SUCCESS, INC.	madce	1:2004cv11825	08/20/2004
Iverson v. City of Boston, Massachusetts			
ACCESS WITH SUCCESS, INC.	madce	1:2006cv12010	11/02/2006
Esposito v. RLJ Medford Hotel, L.L.C.			
ACCESS WITH SUCCESS, INC.	madce	1:2006cv12221	12/12/2006
Smith v. Access With Success, Inc.			

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This person is a party in 10 cases.

1:02-cv-00232- Access with Success, et al v. Haig Realty Trust filed 05/20/02 closed 04/07/03  
JD

1:02-cv-00233- Access with Success, et al v. Gallagher, et al filed 05/20/02 closed 03/24/03  
SM

1:02-cv-00308- Access with Success, et al v. Yankee Greyhound filed 06/28/02 closed 05/09/03  
SM

1:02-cv-00309- Access with Success, et al v. Demoulas filed 06/28/02 closed 04/05/04  
PB Supermarket, et al

1:02-cv-00358- Access with Success, et al v. Ashworth Hotel, filed 08/05/02 closed 07/30/03  
JD Inc.

1:03-cv-00120- Access with Success, et al v. Bob's Stores Center filed 03/24/03 closed 11/24/03  
JD

1:04-cv-00054- Aziz et al v. Rockingham Ventures, Inc. filed 02/12/04 closed 12/15/04  
SM

1:05-cv-00216- Access with Success, Inc. et al v. The Kieley filed 06/13/05 closed 10/19/06  
JD Corporation, Inc.

1:06-cv-00259- Theodore et al v. Salem H Group, L.L.C. filed 07/14/06 closed 12/06/06  
JD

1:06-cv-00470- Theodore et al v. Hampton Beach Casino, Inc. filed 12/18/06  
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